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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 178

DAVIS FROZEN FOODS, INC., Petitioner

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent

RESPONDENT'S BRIEF IN ANSWER TO PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT OF THE CASE

In order that the Court might get a clear picture of the facts in this matter, without so many statements of contentions and arguments as contained in the Brief of the Petitioner, we submit the following:

This is a civil action for damages in which there has been a verdict and judgment for the plaintiff for the recovery of damages that were sustained as a result of a truck's colliding with a trestle bridging the underpass of a State highway at Bailey, N. C. and dislocating plaintiff's railroad tracks over said trestle. The owner of the truck, Davis Frozen Foods, Inc. is the defendant in this action. Plaintiff alleges that the collision with the trestle was due to negligent operation of the truck by defendant's driver, and resulted in the wrecking of one of plaintiff's freight trains. The defendant denies negli-

gence in the operation of the truck and pleads contributory negligence on the part of the plaintiff in failing to provide adequate warning signs on the underpass and in operating the train which was wrecked.

The evidence was to the effect that the underpass, which was built by the State Highway Commission beneath plaintiff's tracks, had a clearance of only 9.1 feet. Defendant's truck was 9½ feet high. There was no clearance sign on the trestle over the underpass, but by the side of the road some distance away was a warning sign which the Highway Commission had erected, stating that the clearance was 8½ feet. The driver of the truck testified that he did not see this sign, but he had passed through this underpass before when driving a smaller truck and knew that the clearance was low. He testified that he did not think about being in a larger truck on this occasion until he was right at the underpass and he then put his foot on the brakes just as the top of the truck struck the trestle. On cross examination, he admitted that he simply was not thinking that he was driving the larger truck at the time of this collision with the trestle.

The evidence at the trial was to the effect that the rails across the trestle were fastened to cross ties, which in turn were bolted to steel I beams which rested on timbers supported by piling. The top of the truck struck one of the I beams with force sufficient to cause the crumpling of the metal top of the truck across its entire front. The defendant filed a counterclaim in this action for $1,000.00 for alleged damages to the truck, indicating something of the extent to which the truck was bent up and damaged as a result of colliding with this trestle.

When the wreck occurred, about one hour after the truck had struck the trestle, the trestle, including the I beams and cross ties as well as the rails, was found to be out of line just as though it had been shoved over by the collision of the truck against the trestle. There was no evidence that anything had

occurred in the meantime to throw the track and trestle out of line, and although the matter was carefully investigated by both parties, nothing was found except the collision to account for the dislocation. Buckling of the tracks as a result of heat expansion of the metal rails was contended by the defendant to have been a cause of the difficulty; but the evidence was that the wreck occurred in the morning and there was no evidence of any excessive heat at that time. There was some testimony that the driver of the truck and a couple of local residents glanced around underneath the trestle after the truck struck it and did not notice anything out of the ordinary, but none of them were experts or had any ability to judge about that.

There was evidence by the employees of the railroad that the dislocation of the rails could not have been seen by them for a sufficient distance to have stopped the train and to have avoided the wreck, and that the train was stopped as quickly as it could be after the men on the engine were able to see that the tracks were out of line over the trestle. The engine and a number of cars were derailed at the point of the trestle before the train was stopped. The railroad employees on the engine, when they observed the tracks out of line, threw on the brakes and then leaped from the train to the ground for safety to avoid being in the wreck which they anticipated and thought was inevitable.

Petitioner states in its brief that "the entire underpass had been rebuilt just three weeks before" the truck struck it. However, the evidence was to the effect that the rails had not been changed at that time and only some of the substructure had been re-worked, without disturbing the rails.

In the Petitioner's Brief, on page six, Petitioner undertakes to try to show that the trestle was examined by two disinterested witnesses before the train wreck and after the truck struck it, and that they found nothing wrong. The evidence shows that they only glanced around very briefly from beneath

the trestle and they did not go up where they could see the rails and thus see that they were out of line, as they were observed to be by the men on the train, soon afterwards.

The statement on page six of Petitioner's Brief about the testimony of the plaintiff's witness, its General Superintendent Mr. Kennedy, is misleading, unless the rest of that part of the evidence is also considered. There it is seen that he testified that a man of good judgment concerning bridge construction should have been able to detect the displacement caused by the truck if the man was walking under the trestle and looking up, but Mr. Kennedy qualified that by saying that this would be true *only if the man knew what to look for and what to expect*. The testimony in this case indicates that neither of the alleged witnesses mentioned by the defendant, Petitioner, had any experience in matters of that sort nor did any more than to glance about, casually, from underneath the trestle, as above set forth and as fully covered in the evidence.

REASONS FOR NOT GRANTING A WRIT

I

Petitioner bases its argument in support of its Petition for a Writ of Certiorari solely upon its claims that under the law of the State of North Carolina a verdict may not be directed in favor of the party having the burden of proof. Therefore, if the law of North Carolina is otherwise and permits the direction of a verdict in favor of the party having the burden of proof in a case such as this one before the Court, then there is no merit to the one and only "Question Presented" as set forth on page two of Petitioner's Petition and Brief. Thus it follows that Petitioner's four Specifications of Error as set forth on page seven of its Petition and Brief are groundless. The claim that Petitioner makes about this matter is erroneous if the North Carolina State courts could have directed a verdict in favor of the party having the burden of proof, for then the Court of Appeals has simply

conformed to the law of the State of North Carolina, has done nothing contrary to any decisions of the Supreme Court of the United States, has not discriminated against Petitioner and has properly affirmed the judgment of the District Court.

While it may be said that the general rule in North Carolina is that a verdict may not be directed in favor of the party having the burden of proof, nevertheless there has been and is a well known exception to such general rule *to the effect that if the facts are admitted or established and only one inference can be drawn from them, the Judge may draw the inference and so direct the jury.*

In *La Vecchia vs. Land Bank,* 218 N. C. 34, 9 SE(2) 489 (1940) the trial Court directed a verdict for the plaintiff, defendant excepted to this action by the trial Judge and this matter was squarely before our Court. The Court had the following to say in its unanimous opinion:

> "While it is true as a general principle of law that the trial judge cannot direct a verdict in favor of the party upon whom rests the burden of proof, but 'if the facts are admitted or established, and only one inference can be drawn from them, the Judge may draw the inference and so direct the jury'. *McIntosh, N. C. P. & P. page* 632. In the present case the admissions of defendant virtually cover the facts sought to be elicited by the first, second and third issues. As to the fourth issue, the evidence is all one way and is susceptible of only one inference. In the judgment below we find no error."

The above case has not been overruled or modified and is the law in the State of North Carolina today in such situations. The La Vecchia case has been cited with approval in a unanimous opinion by the Supreme Court of North Carolina on this very principle in the Spring Term, 1953, opinions of the Supreme Court of North Carolina, *Finance Company vs. O'Daniel,* 237 NC 286, 74 S. E. La. 717. See also *Carstarphen*

vs. Carstarphen, 193 NC 541, 137 S. E. 658, wherein the trial court directed the jury to answer the first issue for the plaintiff even though plaintiff had the burden of proof on the first issue. On appeal this action of the trial court was affirmed by the Supreme Court of North Carolina in a unanimous opinion.

On the first appeal, of the case now before this Court, from the District Court to the Court of Appeals for the Fourth Circuit, the Court of Appeals specifically held that on the evidence relating to the first issue "reasonable men could not differ as to his (the truck driver's) negligence in running into the trestle . . . Likewise, we think that reasonable men could not differ as to the fact that the collision was the cause of the dislocation of the tracks." *Norfolk Southern Railway Company vs. Davis Frozen Foods, Inc.,* CA (4 Cir.), 195 F2d 622. The Circuit Court reversed the judgment of the District Court on the first appeal and remanded the case for a new trial.

At the second trial of this case in the District Court and after all the evidence of plaintiff and defendant had been presented, the District Judge directed the jury to answer in favor of the plaintiff the first issue (which was the same as the first issue on the first trial). Obviously, the District Judge at the second trial was of the opinion that only one inference could be drawn from the evidence relating to the first issue and that reasonable men could not differ as to the significance of this evidence and that a directed verdict on such issue was proper. On the second appeal of the case at bar to the Court of Appeals for the Fourth Circuit, the Circuit Court holds that there was no substantial difference in the evidence bearing upon the first issue at the second trial and the court goes on to uphold the action of the District Judge in directing a verdict for the plaintiff on the first issue. *Davis Frozen Foods, Inc. v. Norfolk Southern Railway Co.,* CA (4Cir.) ____F. 2d____, decided May 28, 1953.

Thus we see that *three times* now in this case it has been held that on the evidence relating to the first issue reasonable men could not differ as to the significance of the evidence, and this being so, plaintiff would have been entitled under the law of the State of North Carolina to a directed verdict on the first issue if the case had been heard in the State Courts, (*La Vecchia vs. Land Bank, supra*), just as it was likewise entitled to the same in the Federal Courts.

For these reasons Respondent respectfully submits that this is not an appropriate case for the granting of a Writ of Certiorari as the Federal Courts have dealt with the plaintiff and the defendant in this case just as the courts of the State of North Carolina would have done.

II

Since, as we have shown, the District Court and the Court of Appeals have applied the same law as would the State Courts of North Carolina in their rulings in the case at bar, we submit that the lengthy argument and extensive citation by the Petitioner of cases concerning the law in the case of *Erie Railroad Company vs. Tompkins,* (1938) 304 US 64, 82 L.Ed. 1188 as related to the actions of the Circuit Court in this matter, have no pertinency and no merit here.

III

We would point out to the Court that Petitioner is in a curious position in presently attempting to raise a question concerning the right of the Federal Courts to direct a verdict in favor of the party having the burden of proof. In its brief filed in the Court of Appeals on the first appeal of this case, the present Petitioner took the position that the case being reviewed by the Circuit Court was not a case in which reasonable men could not differ as to the effect of the evidence on the first issue, and cited the case which they now seek to repudiate, *Gunning vs. Cooley,* 281 U.S. 90, (P. 7 of said

Brief). And, in this Petitioner's Brief filed with the Circuit Court on the second appeal, this Petitioner argued in its point No. V (pp. 45-9 of said brief) that the District Court erred in not directing a verdict for the defendant (the Petitioner here) on the second issue which dealt with contributory negligence and as to which there can surely be no question but that the defendant (the Petitioner here) had the burden of proof. Thus it appears that Petitioner is trying to blow both hot and cold and is now only grabbing at straws in its effort to delay the execution of justice.

We call further to the attention of the Court that in this Petitioner's Petition to Rehear filed after this case was first decided by the Court of Appeals for the Fourth Circuit, this Petitioner did not take exception to the Court of Appeals' holding that a directed verdict is permissible in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with respect thereto. This Petitioner in that Petition to Rehear took the Court of Appeals to task for allegedly not considering all of the evidence adduced in the trial of this case relating to the first issue.

In that Petition for Rehearing filed by this Petitioner, Petitioner's complaint was stated as follows:

> "We respectfully submit that this and other evidence to which we have called the attention of this Court makes inapplicable the rule stated in the opinion that the Court should, upon request, direct a verdict in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto, and brings into full force and effect the rule reiterated by the United States Supreme Court as recently as January 31, 1949, in *Wilkerson v. McCarthy*, 336 *U. S.* 53, 69 *S. Ct.* 413, that: 'Peremptory instructions should not be given in negligence cases "where the facts are in dispute and the

evidence in relation to them is that from which fair-minded men may draw different inferences." ' " (Page 15 of Petition for Rehearing by appellee filed April 30, 1952, with the Clerk of the United States Court of Appeals for the Fourth Circuit).

From this it is clear that this Petitioner took no issue with the Court of Appeals as to the right of the Federal Court to direct a verdict against the party having the burden of proof in a Federal Court trial in North Carolina. Indeed, this petitioner at that time recognized the right of the Federal Court to so direct a verdict but simply contended that the evidence in this case was such that this case was not a proper case for such a direction.

The Petition to Rehear was denied and this Petitioner took no appeal from the decision or from the denial of its Petition to Rehear. It *should be* and we submit it *is* now too late for Petitioner to seek to attack that ruling when it had every opportunity to appeal at that time. The Petitioner here is seeking to pursue a course which has always been condemned as "trying to take two bites at a cherry". It is well established that the first opinion of the Circuit Court (holding that the District Court should direct a verdict), from which Petitioner did not appeal, thus became the "law of the case" and cannot now be reopened or this question raised anew. If Petitioner desired to raise this question, it should have been done by an appeal from the opinion of the Circuit Court and not at this late date.

IV

One of the principal contentions of the Petitioner is the fact that the trial Court was obliged to follow the rules Petitioner contends exist in North Carolina Courts as to the direction of a verdict. Respondent does not for a moment concede the correctness of this contention in any respect. On the contrary the respondent says that the Federal rule clearly

applies as set forth by the Court of Appeals in both of its two opinions.

In this connection we wish to point out that the Chief Judge of the Court of Appeals, who wrote the opinion on each of the appeals, is a life-long and very able and learned North Carolina lawyer and is well versed in the rules in North Carolina courts from his many years of practice in that State, and he is likewise perfectly familiar with the Federal rules due to his long tenure of office on the Federal Court benches. Therefore, he is in an excellent position to pass upon the very question raised here and which was raised in the Court of Appeals by the Petitioner. On pages 14 and 15 of the Brief of the Petitioner (in the footnotes), there appears a reference to articles by this learned Chief Judge, Honorable John J. Parker. Among other things he is there quoted as having stated in one of the articles, the following:

> "Whether facts constitute a cause of action is a question of local law; but whether, in determining whether such facts have been proven, *the Judge shall pass upon* the question himself, on the theory that evidence is so clear that reasonable men could not doubt what the facts are, or should submit it to the jury for their determination, is so clearly a matter of the *exercise of the judicial function* as hardly to admit of argument." (Emphasis added.)

The trial judge in such an instance is utilizing similar power to that vested in him to determine whether the facts adduced by the party having the burden of proof are sufficient to be submitted to the jury. In North Carolina, as in some other jurisdictions, the action of the trial judge in thus dismissing the plaintiff's case is termed a nonsuit, or dismissal under the statute (Hinsdale Act): "The Court does not weigh the evidence, but assumes it to be true in favor of the defeated party." McIntosh, "North Carolina Practice and Procedure,"

1929, p. 633, citing *In Re Will of Margaret Deyton,* 177 N.C. 494, 99 S.E. 424.

In the case now at bar, the Trial Judge, in directing the verdict on the first issue, did not *weigh* the evidence, but simply *exercised his proper judicial function* in finding that the evidence was all one way and that "reasonable men could not differ" as to the effect of it (as the Circuit Court opinion so well stated it); and therefore the only proper action was a directed verdict, there being nothing to be *weighed* or passed upon by a jury.

A motion for a directed verdict is governed by *Rule 50 of the Federal Rules of Civil Procedure.* This rule of procedure contains no prohibition against the directing of a verdict in favor of the party having the burden of proof.

It is to be borne in mind that Rule 50 of the present Federal Rules of Civil Procedure was prescribed by the Supreme Court after the *Erie Railroad case* cited by the Petitioner had been decided. The Federal Rules of Civil Procedure were prescribed by authority of an Act of Congress enacted in 1934, Title 28, USCA section 723, new Title 28, section 2072. The Statute which gave the Supreme Court the power to prescribe by general rule the practice and procedure of District Courts also states that all laws in conflict with the rules shall be of no further effect.

Apparently, the gist of Petitioner's argument is that in directing the jury to answer the first issue in the affirmative, the Court failed to apply the laws of North Carolina, and, therefore, the decision of our Circuit Court of Appeals is in conflict with the decision of the Supreme Court of the United States in *Erie Railroad Company vs. Tompkins.* In support of this position, Petitioner states that the laws of North Carolina (as Petitioner contends) hold that a directed verdict in favor of the party having the burden of proof is forbidden. As we have already shown in this Brief, that is not necessarily correct. Also, according to Petitioner's argument, the law of North Carolina regards the proper placing of the burden of

proof as a substantive right. Petitioner takes issue with Judge Parker's opinion, in which the Judge states that the question is one of Federal and not of State practice and Petitioner calls attention to the fact that the cases as cited by Judge Parker pre-date *Erie Railroad vs. Tompkins.*

However, in the *Erie Railroad case,* the facts were that plaintiff while walking down a path on the railroad's property, was injured by a train. The question was, whether the laws of Pennsylvania (where the accident occurred), as to the duty owed a person in this position, should be applied in the Federal Court. This case holds that the substantive law of the State must be applied by the Federal Court. However, the question involved in our case is clearly one of *procedure* and *not* of *substantive* law.

We direct attention to the case of *Gorham vs. Mutual Benefit Health & Accident Association of Omaha,* 114 Fed. 2d 97. It was a diversity case from the Eastern District of North Carolina and there the Court of Appeals (Judge Parker writing the opinion) squarely held that the direction of a verdict by the District Judge in favor of the party having the burden of proof was correct and proper, and further held that irrespective of what might be North Carolina's State Court decisions as to the direction of verdicts, in the Federal Courts this is a matter which is governed by Federal procedure and not one wherein local law or local decisions are binding. In that case the *petition for a Writ of Certiorari was denied* by the Supreme Court of the United States, 312 U. S. 688 (1941).

Also the case of *McSweeney vs. Prudential Insurance Company of America,* 128 Fed. 2d 660 (1942) was from the Fourth Circuit Court of Appeals and was a South Carolina case from the Eastern District Court of that state. In that case the Court of Appeals (through Judge Parker, again) squarely holds the same as in the *Gorham case* (*supra*) on the question of directing a verdict in favor of the party having the burden of proof, and cites the *Gorham case* (*supra*). Here

again the *petition for a Writ of Certiorari was denied* by the Supreme Court of the United States, 317 US 658 (1942).

Both the *Gorham case,* (*supra*) and the *McSweeney case* (*supra*) are subsequent to the case of *Erie vs. Tompkins* relied upon by the Petitioner.

It seems to us that these two cases, among others, clearly show the fallacy of the position of the Petitioner and indicate beyond doubt that the petition for a writ of certiorari in this case should be denied as was done in those cases. The plaintiff Railroad in the case now before this Court has already been too long delayed in collecting what money it can from the defendant and it appears that the defendant (here the Petitioner) is simply seeking to wear out this lawsuit by every possible technicality, and we most earnestly submit that the Supreme Court of the United States should not and will not lend its aid to this effort.

CONCLUSION

For all of the foregoing reasons, the Respondent respectfully submits and urges that this Petition for a Writ of Certiorari should be denied. As the District Court and the Court of Appeals have treated this case in exactly the same manner as the Courts of the State of North Carolina would have treated it, there is no question of public importance to the people of the State of North Carolina involved in this Petition, and the opinions of the Court of Appeals for the Fourth Circuit in this case are in no way in conflict with the decisions of this Court or of the Supreme Court of the State of North Carolina, and no confusion or injustice will result from the denial of this Petition for a Writ of Certiorari. On the contrary, defendant (the Petitioner here) has had every proper consideration, a fair and proper trial, and a result has been reached which is manifestly right and just; and the enforcement of the judgment of the District Court as affirmed by the Court of Appeals should not be longer delayed. Ac-

cordingly, Respondent prays that this Petition be denied and that the judgments of the United States Court of Appeals for the Fourth Circuit and the District Judge be undisturbed.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF

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REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Davis Frozen Foods, Inc., a North Carolina corporation, having filed a petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, now replies to brief of respondent, Norfolk Southern Railway Company.

I.

The question presented in the petitioner's brief is whether the United States Court of Appeals erred in affirming a directed verdict in favor of the plaintiff, who had the burden of proof, when the laws of the State of North Carolina strictly prohibit such a direction.

Respondent, while recognizing the rule in North Carolina, cites three cases in support of its position that there is an exception and that is, "if the facts are admitted or established and only one inference can be drawn from them, the judge may draw the inference and so direct the jury". Next, respondent states that this case comes within the above exception, hence no conflict between the holding of the Court of Appeals and the laws of North Carolina.

Petitioner stressfully urges that this is not the situation. The petitioner, Davis Frozen Foods, Inc., never admitted its liability, forcefully contested the issues throughout, and produced evidence in sharp conflict with that adduced by the respondent. The theory of the case [illegible]espondent, Norfolk Southern Railway Company, was [illegible]etitioner's truck negligently struck the top of a low [illegible] such damage to the railway trestle that train wreck some hours later. To refute petitioner developed the testimony of three [illegible] inspected, from a distance of two or three feet, the tr[illegible] and bridge *before the train wreck*, and who swore [illegible] served no damage to the trestle (Petitioner's bri[illegible] They further testified that they made their inspe[illegible] the express purpose of ascertaining if any damage [illegible] caused by the truck striking the trestle. The last [illegible] to observe the trestle before the train wreck was r[illegible] ent's train brakeman in the approaching train, wh[illegible] fied that he observed, from a distance of 400 feet awa[illegible] bridge or trestle (not just the tracks) out of line two [illegible] Under no circumstances can respondent now say that [illegible] tioner admitted the damage to the trestle, or that there [illegible] not a sharp conflict of evidence.

Nor can the respondent bring the case within the e[illegible] ception on the ground that "only one inference can b[illegible] drawn". This case was tried twice. The United State Court of Appeals, in its second opinion, stated there was no substantial difference in the evidence bearing upon the first issue (Respondent's brief, p. 6). But note carefully

that the jury awarded a verdict for the defendant upon the first trial on the first issue, which was upheld by the Trial Judge. How is it now possible to say that "only one inference can be drawn" from the evidence?

Furthermore, the North Carolina cases relied upon by respondent in support of its exception to the general rule of the Supreme Court of North Carolina prohibiting directed verdicts in favor of parties having the burden of proof are not in point to the facts of this case.

In *LaVecchia* v. *Land Bank*, 218 N.C. 35, 9 S.E. (2) 489, the plaintiff brought suit against defendant to recover funds fraudulently delivered to defendant-payee in violation of the statute pertaining to certain fiduciary responsibilities and obligations. The defendant admitted two of the statutory violations in his pleadings. *The defendant's evidence*, consequently there was no contradiction of plaintiff's evidence to the third issue. Under the circumstances, the evidence was found to be all one way and susceptible of only one inference. To say that the law applied to the facts in that case is applicable to the case at bar is farfetched and misleading. Nothing is admitted here, the evidence is conflicting, and different inferences could be and have been drawn. How else can be explained that at the first trial, a jury of twelve reasonable men found for the petitioner, and that upon a subsequent hearing, the Trial Judge refused to allow the motion of respondent to set their verdict aside? Respondent, on page 7 of its brief, states that "three times now in this case it has been held that reasonable men could not differ as to the significance of the evidence . . .", but respondent overlooks the first two times when reasonable men found otherwise.

The respondent cites the North Carolina case of *Finance Co.* v. *O'Daniel*, 237 N.C. 286, 74 S.E. 717, to support its position. This case is of no help to the respondent for there the Court held, on page 291, "as different inferences can be drawn from the evidence, it was prejudicial error for the Court to give a peremptory charge . . .", and the case was remanded for a new trial!

The last North Carolina case cited by respondent is *Carstarphen* v. *Carstarphen,* 193 N.C. 541, 137 S.E. 658. This was an ejectment proceeding, wherein the Court instructed the jury to find that the plaintiff was entitled to possession of a tract of land, for which he was suing, when the uncontradicted evidence of a deed produced *by the defendant* showed title in the plaintiff. The Court concluded as follows:

> "The next vice in the charge complained of by the defendants is that the verdict is a directed one, and this cannot be done when the burden of proof was on plaintiff; it was an issue of fact for the jury, and not for the Court to determine, citing *Cox* v. *R. R.*, 123 N.C. 611; *Bank* v. *School Committee*, 121 N.C. 109. Conceding this contention is correct, *yet the defendants' evidence,* by every reasonable interpretation, and that unobjected to introduced on the part of plaintiff, all show that the title to the "Sykes Old Store Place" was in plaintiff."

Here again we have a case where there was no conflict in the evidence, and a situation where the defendant proved himself out of Court by his own evidence. To say that in the instant case the petitioner did likewise is a gross misinterpretation of the facts.

It is to be noted that the last opinion of the United States Circuit Court of Appeals in the instant case did not concern itself with any exception, presented now by the respondent for the first time, to the North Carolina rule prohibiting the direction of verdicts in favor of the party having the burden of proof. Chief Judge Parker summarily dismisses the conflict by saying "the question is one of Federal and not state practice." (Petitioner's brief, page 23). This is the error that will bring mischievous results in this state.

II.

Respondent, in paragraph III of its brief, page 7, ignores the fact that this petitioner was awarded a verdict in the first trial which the Trial Judge refused to set aside. On

respondent's appeal, petitioner contended, as it does now, that the first issue was for the jury.

III.

Respondent argues, page 9 of its brief, that it is now too late to appeal and that appeal should have been taken after the United States Court of Appeals reversed the District Court in the first case, and remanded for new trial. It is sufficient to say that such an appeal at that time would have been premature. The judgment was not final, for the case was remanded for a new trial. *American Contruction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 37 L. Ed. 486.

IV.

The respondent very ably, on pages 12 and 13 of its brief, points out the confusion that now exists as a result of the decisions of Chief Judge Parker of the Fourth Circuit in *Gorham* v *Mutual Benefit Health & Accident Association of Omaha*, 114 Fed. 2d 97, and *McSweeney* v. *Prudential Insurance Co. of America*, 128 Fed. 2d 660, (neither of which are cited by Chief Judge Parker in his opinion in this case), which declare that state law does not control Federal Courts in the direction of verdicts. The laws of North Carolina prohibit a directed verdict in favor of party having the burden of proof. If the matter is left to stand, the doctrine of the *Erie* Case was for nought, and litigants in this state will be plagued by two methods of justice.

WHEREFORE, petitioner respectfully prays that this Writ be granted and that the judgment of the United States Court of Appeals and the District Judge be reversed.

Respectfully submitted,

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